IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO. 314 OF 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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STATE OF GUJARAT & ANR. - Appellant(s)

Versus

M/S. V. B. PATEL & CO. - Respondent(s)

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Appearance :
MR. A.Y. KOGJE, AGP for Appellant No(s).: 1,2.
None for Respondent though served.
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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 29/08/2005

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. The present First Appeal has been filed under Section-19 of the Arbitration Act, 1940, read with Section-96 of the Code

of Civil Procedure against Judgement and Order dated 12th July, 1998 passed in Special Civil Suit No.120 of 1986 by the learned Civil Judge (S.D.), Ahmedabad (Rural) at Narol, rejecting the objections filed by the appellants under Section-30/33 of The Arbitration Act, 1940 and making the award dated 20th April, 1988 (Exh.43) rule of the Court.

2. The short facts necessary for disposal of the present case are that the present respondent–original plaintiff filed an application/suit before the learned trial Court that in view of the dispute, which had arisen between the parties in a work's contract, the matter in accordance with Clause-30 of the agreement be referred to the Arbitrator. The Court, accordingly, after hearing the present appellants, referred the matter to the sole Arbitrator, namely, Mr.M.H.Vakharia. The parties appeared before the said Arbitrator and the proceedings commenced with effect from 4th January, 1987. The Arbitrator observed that the plaintiffs were entitled to an award in the sum of Rs.11,16,830=00 and Rs.88,998=00 with 17% interest. After the award was published by the Arbitrator, the present respondent filed a suit before the learned trial Court for making it rule of the Court.

3. The present appellants raised various objections submitting, *inter alia*, that claim item Nos.16, 17, 18 and 19 could not be taken into consideration by the Arbitrator, as the same were not referred by the Court under its earlier Order

dated 30th June, 1980. It was also submitted that the respondent was not entitled to any interest; that non-consideration of the counter claim was in itself bad and made the award illegal and contrary to law. The objections were properly replied by the plaintiff, who submitted, *inter alia,* that under the Interest Act, the plaintiff was entitled to interest from a particular date, claim Nos.16 to 19 were for a very small amount and as the parties submitted to the jurisdiction of the Arbitrator, it would not be possible for the State to raise various objections after the award is made. It was also submitted that the counter-claim made by the State Government was not coming within the sweep of Clause-30 of the agreement, therefore, the Arbitrator was justified in ignoring the said claim.

4. The learned trial Court, after hearing the parties, observed that the award of interest at the rate of 17% was just and proper and the claims at Item Nos. 16, 17, 18 and 19 were beyond the jurisdiction of the learned Arbitrator and the counter-claim made by the State Government was beyond the scope of Clause-30 of the agreement and as such, it was not required to be considered. The trial Court also observed that the Arbitrator had to decide the claim coming under the scope of tender condition No.30 and if the claim lodged by the State Government in the nature of cross objections, was not falling within the sweep of Clause-30 of the agreement/tender conditions, then, there was nothing wrong in it. The trial

Court, accordingly, set aside the award pertaining to Claim Item Nos.16 to 19, which was in the sum of Rs.88,998=00, but, upheld the other items and grant of the interest.

5. Being aggrieved by the said judgement and decree, making the award rule of the Court, the State is before this Court.

6. Learned Assistant Government Pleader for the appellants submits that a fair understanding of Clause-30 would make it clear that whenever there is a dispute relating to a contract, then, the matter had to be referred to the sole arbitration of the person, who is holding or has held the post, not below the rank of Superintending Engineer under the Public Works Department of the State of Gujarat. It is submitted that the claims lodged by the appellants were also falling within the sweep of Clause-30 and the appellants were entitled to press upon the cross objections.

7. For proper appreciation of the arguments, it would be necessary to refer to Sub-clause (1) of Section-30 of the agreement, which reads as under:

> “Clause-30 :
> 30(1) The disputes relating to this contract, so far as they relate to any of the following matters, whether such disputes arise during the progress of the work or after the completion or abandonment thereof, shall be referred to the sole arbitration of the person who is holding or has held a post not below the rank of a Superintending Engineer under the Public Works Department of the State of

Gujarat. :

Namely:-

(i) The rates of payment under clause-5 for any tools, plants, materials and stores, in or upon the works or the site thereof or belonging to the contractor or procured by him and intended to be used for the execution of the work or any part thereof which possession may have been taken by the Engineer in charge under the said clause-5.

(ii) The reduction in rates made by the Engineer in charge under clause-9 for the items of work not accepted as completed fully in accordance with the sanctioned specifications.

(iii) The rates of payment for any class of work which is included in the additional or alterated work carried out by the contractor in accordance with the instruction of the Engineer in charge under clause-14 and the rate for which is to be determined under the said clause-14.

(iv) The rates of payment materials already purchased for agreed to be purchased by the contractor before receipt of notice given by the Engineer in charge under clause-15 and/or the amount of compensation payable to the contractor, under the said clause for loss in respect of such materials.

(v) The amount of compensation which the contractor shall be liable to pay under clause-17 in the event of his failure to rectify, remove or reconstruct the work within the period specified in the written intimation or the amount of expenses incurred by the Engineer in charge under the said clause-17 in rectifying, removing or re-execution the work or in removing and replacing the materials or articles complained of.

(vi) The reduction of rates as may be fixed by the Engineer in charge under clause-17 for the inferior work or materials as accepted or made use of.

(vii) The amount of compensation payable by the contractor for damage as estimated and assessed under clause-23.

(viii) The amount payable to the contractor for the

> work carried out under clause-33 in accordance with the instructions and the requirement of the Engineer in charge in a case where there is specification."

A fair understanding of Clauses (v), (vi), (vii) and (viii) of Clause-30(1) would make it clear that the claim relating to "reduction of rates as may be fixed by the Engineer in charge under clause 17 for the inferior work or materials, as accepted or made use of"; "the amount of compensation payable by the contractor for damage, as estimated and assessed under Clause-23"; "the amount of compensation which the contractor shall be liable to pay under Clause-17 in the event of his failure to rectify, remove or reconstruct the work, etc.", would come within the ambit of Clause-30 of the agreement. The Arbitrator could not straightway reject the counter claim simply observing that the counter claim would not be considered under Clause-30 of the agreement.

8. It appears that the learned Court below thought that Clause-30 of the agreement protects the rights of the contractor only and gives an authority to the contractor to refer the matter to the Arbitrator either at his instance or through the agency of the Court. In our considered opinion, Clause-30 cannot be read in a manner, which deprives the State Government of its right to lodge the counter claim. A lopsided reading of the agreement would lead to an illegality and as the Arbitrator did not look into the claim /counter

claim submitted by the State Government, the award made by the Arbitrator cannot be upheld.

9. Under Section-30, read with Section-33 of Indian Arbitration Act, 1940, non-consideration of the counter claim, in view of the judgement of the Apex Court in the matter of ***K. V. George vs. Secretary to Government, Water and Power Dept., Trivandrum & Anr.***,[(***1989***) ***4 SCC 595***], would amount to misconduct, especially, when the same had a material bearing in the matter and was required to be considered in accordance with Clause-30 of the Agreement.

10. The non-consideration of the counter claim has vitiated the award, which, in our opinion, deserves to be set aside. The judgement and decree made by the learned Court below, making the award rule of the Court, are set aside. The award is also quashed. Ordinarily, there would not have been a problem, worth referring the matter back to the Arbitrator for reconsideration of the claim and the counter claim, but, in view of Section-21 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, the matter now cannot be dealt with by the Arbitrator.

11. The matter is remitted to the trial Court with a direction that it shall secure attendance of the parties and within 15 days of the attendance of the parties, shall refer the matter to the concerned Tribunal in accordance with

Section-21 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992.

12. The appeal is allowed. As none appears for the other side, there shall be no orders as to costs.

[***R.S.Garg, J.***]

[***K.M. Mehta, J.***]

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